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No. 90-1022

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
Petitioner

v.

JAMES Y. HOPE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHEN A SECOND PROSECUTION OF A DEFENDANT WILL REQUIRE RELITIGATION OF FACTUAL ISSUES ALREADY DECIDED BY THE FIRST, DOES THE DOUBLE JEOPARDY CLAUSE PROHIBIT THE SECOND PROSECUTION?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, James Y. Hope, respectfully requests that this Court deny the petition for writ of certiorari, seeking review the judgment and opinion of the Connecticut Supreme Court entered in this proceeding on July 10, 1990.

STATEMENT OF THE CASE

Procedural History[1]

On October 13, 1981, the State of Connecticut filed a two count indictment charging the respondent with the crimes of conspiracy to commit capital felony murder in violation of Connecticut General Statutes §§ 53a-48(a) and 53a-54b(2) and capital felony murder in violation of Connecticut General Statutes §§ 53a-54b(2) and 53a-8. (Petitioner's Brief, hereinafter Pet.Brf 6A-7A). The respondent moved to dismiss both counts on October 19, 1981, claiming that the capital felony count was defective "for the reason that one cannot be guilty of capital felony murder on the basis of aiding and abetting capital felony murder." (Pet.Brf 7A). On December 21, 1981, the respondent filed his second motion to dismiss. (Pet.Brf 7A). He argued that the conspiracy count, count one, failed to allege an overt act. (Pet.Brf 7A). In addition, he contended that since count two failed to allege the offense of capital felony murder, it was also defective, in that: (1) § 53a-54b(2) requires that a person commit the crime of murder after being hired to do so for pecuniary gain; (2) count two alleged that his co-defendant, Geraldine Burke, hired John McGann, but that the murder was committed by

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[1] The procedural history is set forth below. For the substantive facts, the respondent respectfully refers this Court to the facts as set forth by the Connecticut Supreme Court in *State v. Hope*, 215 Conn. 570, 577 A.2d 1000 (1990). *See* Petitioner's Brief at 1A-20A.

the respondent; and (3) the count failed to allege that Geraldine Burke had hired him. (Pet.Brf 7A-8A).

The trial court dismissed count one, charging conspiracy, because of its failure to allege an overt act, but rejected the respondent's claim as to count two. (Pet.Brf 8A). Consequently, on July 15, 1982, the grand jury returned a new conspiracy indictment alleging several overt acts. (Pet.Brf 8A). During the jury selection process which began on May 3, 1983, and lasted for approximately five weeks, the respondent's counsel advised the court that he believed that both counts of the indictment were defective. (Pet.Brf 9A). In an attempt to resolve the ongoing dispute, the state filed a motion on June 1, 1983 seeking a ruling from the trial court as to the culpability of a defendant for capital felony murder in violation of § 53a-54b(2) when that defendant was not hired to commit the murder, but acted as an accessory or coprincipal to the murder.[2] (Pet.Brf 9A). The trial court did not rule regarding the capital felony count at that time. (Pet.Brf 9A).

After the jury had been sworn, the respondent filed his third motion to dismiss the capital felony murder count on June 29, 1983. (Pet.Brf 9A). Once again, he raised the

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[2] As noted by the Connecticut Supreme Court, "The state conceded in its motion that it had no evidence that the defendant was hired to kill Donald Burke or that he hired anyone to do so. This was the precise issue the defendant had raised in his second motion to dismiss dated December 21, 1981." (Pet.Brf 9A).

issue that he had raised in his pretrial motions to dismiss, to wit: That the capital felony murder count failed to allege that the defendant was hired to kill Donald Burke and that there was no allegation that the alleged hiree, John McGann, murdered Donald Burke. (Pet.Brf 9A). The trial court dismissed the capital felony count with prejudice on July 19, 1983, and advised the parties that a detailed memorandum explaining the basis of its decision would be filed at a later date. (Pet.Brf 9A).

The respondent's trial proceeded as to the first count and on August 9, 1983, the jury acquitted him of conspiracy to commit capital felony murder and the lesser included offense of conspiracy to commit murder. (Pet.Brf 9A-10A). The trial court filed its memorandum of decision on August 19, 1983, dismissing with prejudice the capital felony count, as well as the lesser included murder count. (Pet.Brf 10A). The state sought and was granted permission to appeal the dismissal of the capital felony murder count, but before the state's appeal was heard, the Connecticut Supreme Court decided *State v. McGann*, 199 Conn. 163, 506 A.2d 109 (1986). (Pet.Brf 10A). The *McGann* court held that McGann, who was alleged to have committed the crime of capital felony murder as a principal, could not be convicted of that crime. (Pet.Brf 10A). Thus, in *State v. Hope*, 203 Conn. 420, 524 A.2d 1148 (1987), the Connecticut Supreme Court ruled that the respondent could no longer be tried as an accessory to that capital felony murder and dismissed the state's appeal as moot. (Pet.Brf 10A).

On June 1, 1987, the state filed a substitute information charging the respondent with the crime of murder in violation of Connecticut General Statutes §§ 53a-54a and 53a-8. (Pet.Brf 10A). The state charged that the respondent, "while acting in concert with Geraldine Burke and John McGann did, with intent to cause the death of another person, Donald C. Burke, cause the death of said Donald C. Burke." (Pet.Brf 10A). On November 24, 1987, the respondent moved to dismiss the information on double jeopardy and collateral estoppel grounds and for the additional reason that the murder count had been dismissed with prejudice on July 19, 1983. (Pet.Brf 10A-11A). In response, the state filed an amended substituted information, that again charged the respondent with murder in violation of §§ 53a-54a and 53a-8, but this time alleged: "JAMES Y. HOPE at Waterford, Connecticut, with intent that the death of another person, Donald C. Burke, be caused, intentionally aided Geraldine Burke and John McGann in the causing of the death of said Donald C. Burke." (Pet.Brf 11A). On May 2, 1989, the trial court denied the respondent's motion to dismiss, and the respondent appealed to the Connecticut Supreme Court. (Pet.Brf 11A).

On appeal, the respondent argued that the trial court should have granted his motion to dismiss: (1) because aiding and abetting murder and conspiracy to commit murder are the same offense for double jeopardy purposes; (2) because his prosecution for aiding and abetting murder is barred by principles of collateral estoppel; and (3) because the murder count against him had previously been

dismissed with prejudice. (Pet.Brf 11A). The Connecticut Supreme Court reversed the ruling of the trial court and held that the respondent's motion to dismiss should have been granted because his prosecution for aiding and abetting murder is barred by principles of collateral estoppel as embodied in the double jeopardy clause. (Pet.Brf 11A).

REASONS FOR DENYING THE WRIT

I. THE JUDGMENT OF THE CONNECTICUT SUPREME COURT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR WITH THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS

A. The Connecticut Supreme Court Correctly Held That The Respondent Did Not Waive His Double Jeopardy Protection By Renewing His Motion To Dismiss After The Jury Was Sworn

On October 19, 1981, the respondent made his first motion to dismiss the charge of accessory to capital felony murder. His grounds for dismissal were, "[a]s to the Second Count, for the reason that one cannot be guilty of capital felony murder on the basis of aiding and abetting capital felony murder." In his second motion to dismiss, dated December 21, 1981, the respondent argued, "[a]s to count two for the reason that by its language Section 53a-54b requires that a person commit as a principal (and not as an aider or abetter) one of the eight substantive crimes listed. ... There is no allegation that Burke hired Hope. Consequently, the count fails to allege the offense of capital felony murder." In his third motion to dismiss, dated June 29, 1983, after the jury had been sworn, the respondent argued "[b]y use of the phrase 'a defendant' Section 53a-54b(2) requires that the person hired be the defendant on trial, i.e. James Y. Hope. The indictment fails to allege this element of the crime. Instead, it alleges

that Geraldine Burke hired John McGann." As the Connecticut Supreme Court noted, "the [respondent's] position was consistent throughout." (Pet.Brf 13A).

The state argued below and in its petition that the respondent is prohibited from asserting double jeopardy as a bar to this prosecution because he did not move to dismiss the second count until after the jury was sworn. The state attempts to liken this case to *Lee v. United States*, 432 U.S. 23 (1977). In that case, this Court held that the defendant could not assert double jeopardy where the trial court was forced, because of the defendant's late filing, to rule on the motion to dismiss after jeopardy had attached. However, as Justice Brennan pointed out in his concurrence, a different result would obtain where "the petitioner had afforded the trial judge ample opportunity to rule on his motion prior to trial. ... Even if the defendant renews his motion at trial, it would not be accurate in such a situation to argue that the defense made the choice to forgo the right of presenting its case to the first factfinder". *Id.*, 35-36 (Brennan, J., concurring).

In the instant case, this was the situation faced by the respondent. The respondent had repeatedly made the claim that the second count must be dismissed because it failed to allege that James Hope was hired to kill Donald Burke. The state conceded in its offer of proof that it could not prove that James Hope was hired to commit the murder. (R. at 25) Thus, the trial court's ruling was clearly unnecessarily and prejudicially delayed and the respondent

did not waive his right to assert a claim of double jeopardy.

The state does not seem to disagree with this reasoning. The linchpin of its argument in this regard is that the respondent's third motion for dismissal was not based on the same grounds as the prior two. As the Connecticut Supreme Court noted, a reading of the above-quoted language from the respondent's three motions for dismissal makes it abundantly clear that he argued the same grounds on all three of these motions. Therefore, the state's argument that the respondent has somehow "waived" his double jeopardy protection is without merit.

As further justification for the inapplicability of double jeopardy the petitioner makes the argument, citing *United States v. Scott*, 437 U.S. 82 (1978), that because the mid-trial dismissal of the capital felony murder count was granted on grounds unrelated to guilt or innocence, the state is not barred from retrying the respondent. The reasoning of this case is inapplicable to the case at bar. This Court in *Scott* held that "the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court." *Id.* at 98-99.

The mistried count at the first trial was capital felony murder. The State in this case was granted an appeal

pursuant to *Scott* by the trial court at the conclusion of that trial. The Connecticut Supreme Court dismissed the appeal as moot after the state conceded that the respondent could no longer be tried on a charge of capital felony murder. *State v. Hope*, 203 Conn. 420, 524 A.2d 1148 (1987). The state is now attempting to prosecute the respondent in this case for murder as an accessory. As will be explained below, the Connecticut Supreme Court correctly held that the state is collaterally estopped under the double jeopardy clause from prosecuting this new charge because the jury's verdict of acquittal in the first trial of the crimes of conspiracy to commit capital felony murder and conspiracy to commit murder conclusively established that the respondent did not have the intent to commit murder.

The petitioner cites an additional case from this Court in support of his argument that the respondent is precluded from asserting double jeopardy as a bar to the instant prosecution. The petitioner cites *Jeffers v. United States*, 432 U.S. 137 (1977) for the proposition that, in the context of separate trials, the principles of double jeopardy are inapplicable if the defendant elects to have the two offenses tried separately. In *Jeffers* the respondent, who was charged with two offenses, argued for separate trials. The purpose of the respondent's motions to dismiss in the instant case was not to sever the prosecutions but to correct a defective information. Therefore, the petitioner's reliance on *Jeffers* is misplaced.

Accordingly, the Connecticut Supreme Court's holding that the respondent did not waive his double jeopardy protection by renewing his motion to dismiss after the jury was sworn does not conflict with federal decisions, and consequently, the petition must be denied.

B. Applying Well Established Law, A Unanimous Connecticut Supreme Court Correctly Held That Where A Jury Has Previously Found That An Element Of The Charged Offense Does Not Exist, The Double Jeopardy Clause Prohibits The Prosecution

In his appeal to the Supreme Court of Connecticut, the respondent argued that the Double Jeopardy clause forbade the state from prosecuting him for the crime of murder after he had been acquitted of the crimes of conspiracy to commit capital felony murder and the lesser included offense of conspiracy to commit murder. He observed that the constitutional prohibition of double jeopardy "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977) quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Several "tests" have been employed by the courts in analyzing the claim that a prior acquittal bars the state from pursuing a second prosecution. *See e.g. United States v. Blockburger*, 284 U.S. 299 (1932); *Illinois v. Vitale*, 447 U.S. 410 (1980);

Ashe v. Swenson, 397 U.S. 436 (1970). The Connecticut Supreme Court correctly and properly applied the "collateral estoppel" test enunciated in *Ashe* to the facts of the instant case.

"It is firmly established that collateral estoppel applies to criminal prosecutions as an element of the double jeopardy clause, *Ashe v. Swenson*, 397 U.S. 436 (1970); *United States v. Cala*, 521 F.2d 605, 607 (2d Cir. 1975), and that the Government is precluded from relitigating an issue decided in defendant's favor by a valid final judgment." *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979). If the issue decided in the first trial is essential to conviction in the second trial, prosecution of the offense is prohibited. *United States v. Siejo*, 537 F.2d 694, 696-697 (2d Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977). The Connecticut Supreme Court concluded that the respondent could not be prosecuted because his first jury necessarily found that he did not have the intent required for conspiracy to commit capital felony murder or conspiracy to commit murder and that that same intent would be required to be proven in his prosecution for murder.

The application of the principle of collateral estoppel is a two part process: "The court must first determine what facts were necessarily decided in the first trial...us[ing] 'realism and rationality'...the court must then assess whether the government is attempting to relitigate those facts in the second proceeding." *United States v. Levy*, 803 F.2d 1390, 1398-99 (5th Cir. 1986). *See also*

United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961). The court below recognized that "the seminal question that we must resolve is whether, in the [respondent's] trial for conspiracy to commit capital felony murder, the jury could have acquitted the [respondent], yet still, rationally and reasonably, have found that the [respondent] possessed the specific intent that Donald Burke be murdered." (Pet.Brf 18A).

At his trial for conspiracy, the respondent admitted he was aware of the plan to murder Donald Burke. (T13 at 42-44; 62-64) The respondent admitted that he met with McGann and Geraldine Burke the night of the murder. (T13 at 92-94) He admitted he knew Geraldine Burke gave McGann a gun for the purpose of killing Donald Burke. (T13 at 95-96) He admitted driving McGann to the Burke residence knowing that Geraldine Burke and McGann intended to commit the murder. (T13 at 95-97) Hope further conceded that he was in the Burke's home when the killing occurred and that he assisted in the removal of the body and the secreting of evidence. (T13 at 105-112) Thus, the only issue for the jury to determine was whether Hope intended to aid, abet or directly participate in the murder or whether Hope in fact intended to stop the killing.

There was also evidence that the respondent had offered Geraldine Burke money to forget her plan, that McGann had asked for the respondent's help in "reasoning" with Geraldine Burke, and that the respondent had in fact attempted to talk Geraldine Burke out of her

plan. (T13 at 64, 90, 95, 97, 100-104, 132, 283) Furthermore, the respondent testified that his purpose in driving to the Burke residence was to stop the killing. There was also evidence of the respondent's intoxication and an instruction on the effect intoxication may have on a person's intent. (T12 at 15, 19, 25-28; App. B at 43-44)

It is obvious that the jury did not accept the State's theory that the respondent was a co-principal who aided in the murder. It is equally clear that the jury could only have acquitted the respondent if they found that in doing these acts, he lacked the requisite intent to become a member of the conspiracy, i.e. intent that a murder be committed. It is simply inconceivable that a rational jury could have believed that the respondent beat Burke about the head and was present when McGann shot him but never agreed to the murder or intended to have Burke murdered. Thus, when the evidence is viewed with "realism and rationality" it is clear that the jury "necessarily determined" that the State failed to prove intent beyond a reasonable doubt.

The Connecticut Supreme Court noted in this case that "[i]f the jury believed the state's version of the case ... we cannot conceive of how the jury could have rationally and reasonably concluded that the [respondent] had the intent that Donald Burke be murdered, but did not 'agree' with McGann 'to engage in or cause the performance' of the murder." (Pet.Brf. 19A). Because the Connecticut Supreme Court properly applied the collateral estoppel

prong of the double jeopardy clause and came to the inevitable conclusion that the respondent's prosecution for murder was barred, the petition must be denied.

C. In The Particular Circumstances Of This Case, The Respondent's Acquittal As To The Conspiracy Count Bars A Second Prosecution On The Murder Count

On page 16 of its brief in support of its petition, the state argues that "[t]he judgment of the Connecticut Supreme Court in effect holds that where a defendant is charged with both a conspiracy, and the underlying substantive count as an accessory, acquittal of the former bars reprosecution of the latter." This reading of the Connecticut Supreme Court's decision in this case is completely unfounded. As explained in detail above, the Connecticut Supreme Court based its decision, not on a *per se* rule that an acquittal on the conspiracy charge precludes prosecution of the underlying offense as the state argues, but on the principle of collateral estoppel, grounded in the double jeopardy clause of the fifth amendment. The court below explicitly stated: "In sum, we conclude that the jury necessarily determined that the [respondent] lacked the specific intent that Donald Burke be murdered, and thus, since that same intent is an essential element of the state's second prosecution, *the state is collaterally estopped from proceeding with that prosecution.*" (Pet.Brf 20A) (emphasis added). Indeed, the very case the state cites for the proposition that there is no *per se* rule expressly states that collateral estoppel

can act as a prohibition to the second prosecution. "None of this is meant to suggest that an acquittal of conspiracy can never operate as collateral estoppel on a substantive count." *United States v. Jackson*, 778 F.2d 933, 940 (2d Cir. 1985). In this particular case the respondent argued, and the Connecticut Supreme Court agreed, that the principle of collateral estoppel operates to preclude the state from prosecuting the respondent on the charge of murder.

II. THE CONNECTICUT SUPREME COURT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, IT HAS MERELY APPLIED ESTABLISHED DOUBLE JEOPARDY LAW TO THE FACTS OF THIS CASE

In section II of its brief, the state argues that the Connecticut Supreme Court, in its decision below, decided an important question of federal law. The petitioner attempts once again, as he did in the first portion of his brief, to draw parallels between this case and *Lee v. United States*, 432 U.S. 23 (1977). The petitioner argues that where the defendant waits until after the jury is sworn before making his motion to dismiss, he cannot avail himself of double jeopardy protection. Therefore, according to the petitioner, it was error to apply the doctrine of collateral estoppel to this case. The premise of this argument is that the respondent has waived his double jeopardy protection by making the motion. It ignores the fact, explained above, that the Connecticut Supreme Court

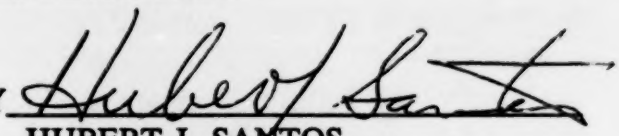
expressly found that the defendant did not waive his double jeopardy protection because he made two prior motions to dismiss, based on the same grounds, before jeopardy attached. As explained in section I.B *supra*, this is not an "important question of federal law" decided for the first time by the Connecticut Supreme Court, it is a question that was settled by this Court in *Lee*.

Finally, the petitioner argues that this case should be reviewed by this Court in light of its recent decision in *Grady v. Corbin*, 495 U.S. ___ (1990). *Grady*, however, is not controlling here. That case was not concerned with the collateral estoppel effect of a prior prosecution but with, as the petitioner and the Connecticut Supreme Court both correctly noted, successive prosecutions for the same offense, regardless of any collateral estoppel considerations. In this case, the court applied the more restrictive collateral estoppel test and found that the state was barred from prosecuting the respondent. Therefore, the issues presented in *Grady* are moot in this case and can not be addressed by this Court.

CONCLUSION

For all the foregoing reasons, the respondent respectfully requests this court to deny the petition.

THE PETITIONER

BY 

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